Office-Supreme Court, U.S.
FILED
JAN 10 1964
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 657

MELVIN H. OSTERMAN,

Petitioner,

v.

COURT ON THE JUDICIARY OF THE STATE OF NEW YORK; BY BRUCE BROMLEY, ESQ., COUNSEL DESIGNATED BY SAID COURT TO CONDUCT THE PROCEEDINGS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT ON THE JUDICIARY OF THE STATE OF NEW YORK

BRIEF FOR THE RESPONDENT IN OPPOSITION

January 10, 1964.

BRUCE BROMLEY
Counsel for respondent,
1 Chase Manhattan Plaza,
New York 5, N. Y.

FREDERICK A. O. SCHWARZ, JR.,
Of Counsel.

INDEX

	PAGE
QUESTION PRESENTED	1
STATEMENT OF THE CASE	2
ARGUMENT	6
CONCLUSION	15

TABLE OF AUTHORITIES

Cases

Application of the Waterfront Comm'n of N. Y. Harbor, 39 N. J. 436, 189 A. 2d 30 (1963) 12

Beilan v. Board of Educ., 357 U. S. 399 (1958) 6, 7, 8

Brozen v. Walker, 161 U. S. 591 (1896) 7

Cohen v. Hurley, 366 U. S. 117 (1961) 6, 8, 9

Lerner v. Casey, 357 U. S. 468 (1958) 6, 7, 8

Matter of Cohen, 7 N. Y. 2d 488, 166 N. E. 2d 672 (1960) 13

Matter of Lerner, 2 N. Y. 2d 355, 141 N. E. 2d 533 (1957) 13

Murphy v. Waterfront Comm'n of N. Y. Harbor, cert. granted, 375 U. S. 812 (1963) 12

Nelson v. County of Los Angeles, 362 U. S. 1 (1960) 6, 7, 8

People v. Laino, 10 N. Y. 2d 161, 176 N. E. 2d 571 (1961) 4

People v. Steuding, 6 N. Y. 2d 214, 160 N. E. 2d 468 (1959) 4

Quinn v. United States, 349 U. S. 155 (1955) 11

Snyder v. Hughes, 321 U. S. 1 (1944) 13

Ullmann v. United States, 350 U. S. 422 (1956) 7

PAGE

Constitution

Constitution of the State of New York,
Article I, Section 6 4
Article VI, Section 22 ..... 2, 5
Article VI, Section 23 2
Article VI, Section 24 2

Miscellaneous

Canons of Judicial Ethics, Canons 4, 13, 25, 26, 28, 30, 31 and 33 11
Griswold, *The Fifth Amendment Today* (Harvard University Press, Cambridge, 1955) 11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

MELVIN H. OSTERMAN, *Petitioner*, v. COURT ON THE JUDICIARY OF THE STATE OF NEW YORK, BY BRUCE BROMLEY, ESQ., COUNSEL DESIGNATED BY SAID COURT TO CONDUCT THE PROCEEDINGS, *Respondent*.	No. 657

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT ON THE JUDICIARY OF THE STATE OF NEW YORK

BRIEF FOR THE RESPONDENT IN OPPOSITION

QUESTION PRESENTED

New York's Court on the Judiciary—a special court composed of judges and justices selected from New York's five highest courts which is given power to pass upon the fitness for further service of members of New York's judiciary—has unanimously construed the Constitution of the State of New York to support its order removing petitioner Melvin H. Osterman from his position on the New York Court of Claims for insisting upon personal immunity as a condition to disclosing what he knew about corruption in the state government to a state grand jury which was concededly investigating such corruption in good faith. The question presented is whether the Court on the Judiciary's

order removing petitioner from the bench violates the Constitution of the United States.

STATEMENT OF THE CASE

The Court on the Judiciary's only function is to consider whether judges should be removed or disciplined or retired.* (Constitution of the State of New York, Article VI, Section 22.) The Court was created by constitutional amendment in 1948 as an addition to provisions of the New York State Constitution which empowered (and in Sections 23 and 24 of Article VI of the New York Constitution still empower) the legislature or the legislature in conjunction with certain judges to remove judges from office. The Court on the Judiciary's power is patterned upon the legislative removal sections of the New York Constitution in that it can only remove a judge for "cause" (compare Section 23) and at least a two-thirds majority is required for a removal to be effectuated (compare Sections 23 and 24).

* * *

Petitioner was given a recess appointment to the Court of Claims by the Governor of the State of New York on July 11, 1961, and in January 1962 the State Senate consented to his appointment for a full nine-year term to expire on July 11, 1970. (Charges for Removal, para. 1, App. 30; Admitted: Answer, para. 1, App. 42.**)

On March 26, 1963, petitioner at Mr. Scotti's request went to the office of Alfred J. Scotti, the Chief Assistant

*It is composed anew on each occasion that it is convened. Its membership consists of the Chief Judge and the Senior Associate Judge of the Court of Appeals and of a justice chosen from each of the four departments of the Appellate Division by a majority of his fellow justices.

**Appendix references are to the pages at the end of the petition.

District Attorney of New York County, who was conducting a grand jury investigation to determine whether crimes had been committed in connection with the administration of the New York State Liquor Authority. In answer to Mr. Scotti's questions, petitioner stated that he had practiced law in relation to State Liquor Authority matters before becoming a judge but denied that he had continued to deal with State Liquor Authority matters after his accession to the bench. He specifically denied that in July 1962 —a year after his accession to the bench—he had discussed with the then Chairman of the State Liquor Authority, Martin C. Epstein, the difficulties the Bermuda Sales Corporation was having with the State Liquor Authority with respect to its New York City liquor store license. Mr. Scotti thereupon told petitioner that there was information to contradict petitioner's denials and asked him to appear before the grand jury investigating the State Liquor Authority. (Charges for Removal, paras. 4 and 5, App. 37; Admitted: Answer, para. 1, App. 42.)

On April 15, 1963, petitioner appeared, not pursuant to a subpoena, before a quorum of a New York County grand jury. Mr. Scotti told petitioner that he had been requested to appear before the grand jury "in connection with an investigation to determine whether there was in existence a conspiracy to commit the crimes of bribery of a public officer attached to the State Liquor Authority." (Charges for Removal, para. 6, App. 38; Admitted: Answer, para. 1, App. 42; Transcript of proceedings before grand jury, App. 45-46.) At the oral argument below it was conceded that "the grand jury . . . and the prosecutor were in good faith investigating into alleged public corruption related to the State Liquor Authority, that they sought in good faith to question the Judge in connection with that inquiry" and that petitioner knew that the information

sought from him related to his knowledge of public corruption during the period that he was a judge. (Opinion, App. 23-24.)

When petitioner appeared, Mr. Scotti asked him to sign a general waiver of immunity prior to being questioned before the grand jury. Without such a general waiver, petitioner—if found after the event to have been one of the targets of the grand jury investigation—would have become immune from indictment by the grand jury and would have been entitled to have excluded from any criminal prosecution that might be brought against him any incriminating information that he might supply to the grand jury and any leads derived from it. *People* v. *Laino*, 10 N. Y. 2d 161, 176 N. E. 2d 571 (1961); *People* v. *Stending*, 6 N. Y. 2d 214, 160 N. E. 2d 488 (1959). Petitioner refused to sign a general waiver of immunity and stated that he was only willing to sign a waiver with respect to questions that involved the performance of his judicial duties as he was required to do by Section 6 of Article 1 of the Constitution of the State of New York if the inquiry related to the performance of his judicial duties which he knew it did not. (Opinion, App. 23-24, Concurring Opinion, App. 28.) Mr. Scotti then repeated, however, that he wanted to question the judge about a conspiracy to bribe a State Liquor Authority official and said that he did not want to question him about the performance of his judicial duties. When petitioner persisted in his refusal to sign a general waiver of immunity, he was excused by Mr. Scotti. (Charges for Removal, para. 6, App. 38; Admitted: Answer, para. 1, App. 42; Transcript, App. 46, 47, 48.)

On April 16, 1963, after petitioner, through his counsel, had refused a request that he resign made by the Governor of the State of New York, the Governor made

a written request, pursuant to Section 22 of Article VI of the New York Constitution, to the Chief Judge of the Court of Appeals to convene a Court on the Judiciary to consider whether petitioner should be removed. (App. 53-56 and 51-52.) The court was accordingly convened.

Charges for removal were filed on May 25, 1963 by the undersigned, who had been designated as counsel to conduct the proceeding. The charges for removal included three allegations of cause for removal in addition to the one based upon petitioner's refusal to sign a general waiver of immunity.* By agreement between the parties, approved by the Court on the Judiciary, the initial hearing was, however, based solely upon the charge that a judge should not condition his cooperation with a grand jury investigation of official corruption upon an assurance that any information that he might give about official corruption not be used against him. Since the court below held that the admitted facts with respect to that charge constituted cause for removal, there was no need for further proceedings with respect to the three other charges.

On November 7, 1963, petitioner was arraigned in the Supreme Court, New York County, on a six-count indictment charging bribery and conspiracy to bribe State Liquor Authority officials during the period that petitioner was on the bench. Petitioner pleaded not guilty. Trial is scheduled to begin on March 2, 1964.

---

*The additional allegations were (1) that petitioner had practiced law after becoming a judge in violation of the statutory prohibition against his doing so contained in the New York Court of Claims Act, (2) that he had failed to tell the truth to the Chief Assistant District Attorney of New York County, who had been authorized to investigate the State Liquor Authority, when he denied that he had continued to deal with State Liquor Authority matters after becoming a judge and (3) that he had attempted to obstruct said investigation by removing from his office and hiding a typewriter which he knew to be relevant to said investigation. (Charges for Removal, paras. 3, 4, 7 and 8(a), (b) and (d), App. 36-40.)

ARGUMENT

A. Exercising its power to oversee the conduct of the judiciary, New York's Court on the Judiciary unanimously concluded that by insisting upon personal immunity as a condition to disclosing what he knew about official corruption, petitioner had breached his special duty as a judge and should therefore be removed from his special position as a judge. That decision was permissible under the Constitution of the United States as it has been several times construed by this court. *Nelson* v. *County of Los Angeles*, 362 U. S. 1 (1960); *Lerner* v. *Casey*, 357 U. S. 468 (1958); *Beilan* v. *Board of Educ.*, 357 U. S. 399 (1958); *Cohen* v. *Hurley*, 366 U. S. 117 (1961).

But were the Court disposed to re-examine the cases just cited and later discussed, this case would not be an appropriate occasion on which to do so. Because of the nature of the inquiry, the nature of the inquiring body and, most important, because of the nature of the position from which petitioner was removed, the decision below was consistent with the Constitution and can stand alone without the support of this Court's precedents from which the decision below followed *a fortiori*. New York acted constitutionally in ensuring that its judiciary retain public confidence and consist of persons who put aside considerations of personal risk in order to help keep its government clean and its judiciary above suspicion.

Three of the four decisions referred to above—*Lerner*, *Nelson* and *Beilan*—involved the removal from office of public employees who had asserted their constitutional privilege when asked if they were members of the Communist Party and similar questions involving their associations and beliefs. This Court affirmed state court decisions upholding the removal of, respectively, a New York City Transit Authority subway conductor who insisted upon immunity be-

fore the New York City Commissioner of Investigations, a temporary employee of the Los Angeles County Department of Charities who insisted upon immunity before a committee of Congress, and a Philadelphia school teacher whose refusals occurred before officials of the city school system and a committee of Congress (though it was disputed whether the latter refusal played a part in the removal decision).

If minor public employees such as a subway conductor or an employee of a county department of charities can be removed from their public positions surely a judge from whom so much more is expected and whose function is to enforce the law can be removed from his public and privileged position for placing a condition upon his willingness to tell what he knows about corruption in his government.*

*Petitioner says that *Lerner*, *Nelson* and *Beilan* stand for the proposition that "a state may constitutionally discipline a public employee for refusing to answer questions relevant to his employment even though the refusal is based upon his privilege against self-incrimination" and then seeks to distinguish away those cases by stating (1) that petitioner "did not refuse to answer a single question" and (2) that the inquiry did not relate to petitioner's "position on the bench". (Petition, pp. 11-12.) The first purported distinction is irrelevant under the circumstances and the second represents an inaccurate reading of the facts.

Petitioner's refusal to sign a general waiver of immunity with respect to a grand jury inquiry that concededly was concerned with alleged public corruption is precisely the same as a refusal to answer a question or a series of questions about corruption upon the ground that the answer might be incriminating. The legal effect of assertion of the privilege in response to a question is to insist that immunity be granted. If immunity is granted, testimony must be given, since with immunity granted there is no reason to fear self-incrimination and the privilege of silence therefore lapses. *Ullmann* v. *United States*, 350 U. S. 422 (1956); *Brown* v. *Walker*, 161 U. S. 591 (1896). The one who refuses to waive his immunity says directly what the one who asserts the privilege says in legal effect—*i.e.*, that immunity must be granted if he testifies.

The facts with which Mr. Scotti and the grand jury were concerned were highly relevant to petitioner's fitness for the bench—

The inquiry in this case, moreover, was about corruption, not about political associations or belief. Accordingly, there is no first amendment issue here as there was in those earlier cases that the Court affirmed. Contrary to a future effect of the decisions in *Lerner*, *Nelson* and *Beilan*, the decision below if left standing cannot be said to deter the free association upon which a democracy depends or any other desirable conduct. To the contrary, official corruption—their knowledge of which judges in New York have been told they must willingly disclose if they want to remain on the bench—is condemned by the criminal law and is unquestionably a threat to good government.

In *Cohen* v. *Hurley*, 366 U. S. 117 (1961), this Court affirmed New York's disbarment of a lawyer who had refused, on the ground that the answers might incriminate him, to answer questions at an inquiry into the illegal and unethical practices of lawyers. Again the decision below follows *a fortiori* from the earlier decision of this Court. Surely it would not make sense to say that a lawyer was unfit to practice before the court because of conduct which the court itself could engage in with impunity.* Here,

---

though, as in *Lerner*, *Nelson* and *Beilan*, the grand jury was not inquiring into his specific duties. A judge's fitness for the bench depends upon more than the way in which he performs his official duties. Lack of fitness for the bench is shown by the refusal to give information concerning corruption to the grand jury without being assured of personal immunity.

*Petitioner points out that the grand jury did not have power to remove or discipline him as a judge, whereas the inquiry in *Cohen* was sponsored by the Appellate Division which did have power to discipline Cohen as a lawyer. But in *Lerner* and *Nelson* similarly the City Commissioner of Investigations and the House Un-American Activities Committee lacked power to remove or discipline the subway conductor and county welfare workers involved in those cases. Furthermore, the suggestion that a grand jury investigation of official corruption is somehow of lesser significance than the investigations of other bodies cannot be accepted. To the contrary, a grand jury

moreover, New York has confined its action to removing a limited-tenure public official from his state office whereas in *Cohen* a private citizen was banned from practicing his life-long profession.

Thus, whatever one thinks of the cases decided by this Court from which the constitutionality of the removal of petitioner from the bench follows *a fortiori*, the Constitution should not be read to prohibit New York from removing a judge who insists upon personal immunity when asked to testify about official corruption. Such matters as the special burdens and responsibility of judges are matters of ethical judgment rather than legal analysis and undoubtedly are felt most strongly by those who themselves sit on the bench. This Court should not disturb the decision with respect to the standards that must be met by New York's judiciary that has been unanimously made by judges and justices from each of New York's five highest courts.

B. As a man with a special position a judge has special responsibilities. A judge's duty to cooperate with efforts to ensure clean government and attempts to ferret out corruption in the government for which he works and which he at the same time judges cannot be doubted.

Petitioner was asked to testify concerning corruption in the state government. Nothing is more certain than that a judge should cooperate with such an inquiry even if he takes a personal risk in doing so. Corruption and suspicion of corruption subvert all government and are particularly dangerous threats to the judiciary.

---

is a body to which judges owe a duty of cooperation greater than to other bodies. Both judge and grand jury are part of the machinery of justice, and judges' supervisory authority over grand juries will surely be weakened if they refuse to assist a grand jury by giving it information unless assured that the information will not be used against them.

Support for the judiciary depends in large measure upon the judges' reputation for candor and honesty. That support will be seriously undermined if judges refuse to tell what they know about official corruption unless given assurance that they will not personally be prosecuted.

It is not unreasonable or unfair to require judges, if they wish to remain on the bench, to make disclosures which as private citizens they could not be required to make unless assured of personal immunity. Disclosure can be required not of their opinions or beliefs or of personal matters but of matters of public concern the obtaining of information about which is vital to good government and the willing and unconditional disclosure of which is vital to public confidence in the judiciary. To hold judges to higher standards than ordinary citizens or even other public officials is wholly proper.* Refusal to testify about official corruption without an assurance of personal immunity is incompatible with the standards to which the judiciary should be held.

Assertion of the right to withhold incriminating information unless immunity is guaranteed gives rise to a legitimate suspicion of guilt, at least in cases where belief is not involved. Action should not be (and was not below) based upon a conclusion that a judge who refuses to answer questions about official corruption without being assured of immunity is in fact guilty of corruption. For an innocent man may fear that his answers will incriminate himself—though such fear is probably less likely for a judge who presumably can better than most people avoid confused explanations, put forward the favorable inferences and ensure that all the facts are placed upon the record.

*Whatever one may think, for example, about the constitutionality of a ban upon partisan political activity by employees of the executive branch, industrial as well as administrative, is it not clear that it is constitutional to prohibit judges from engaging in partisan politics?

But even though the inference of guilt from insistence upon immunity when asked to testify about corruption is not compelling and may be erroneous in some cases, the insistence does give rise to a legitimate suspicion.* The fact that the suspicion will not, if all is known, prove to be justified in every case does not invalidate the conclusion that the suspicion does arise in all cases.

It should not be held that it is unconstitutional for New York to say to its judges that they should be above suspicion and beyond reproach. The Canons of Judicial Ethics, which are filled with injunctions to avoid suspicion and be beyond reproach, see Canons 4, 13, 25, 26, 28, 30, 31 and 33, are illustrative of the principle that judges, whatever the true facts may be, must avoid action which is suspicious.

Of course, it is conceivable that an innocent man might open the door to his prosecution, and even conviction, if he answered questions about official corruption without obtaining immunity. But a judge must take that risk in order to help the public in efforts to keep its government clean, as a good judge must risk his personal popularity when it is just to make an "unpopular" decision. As a man with a special position a judge has special duties.

In becoming a judge a man undertakes a heavy burden. New York should not be prevented from ousting from its

*It does not denigrate the values underlying the privilege against self-incrimination to say that claiming the privilege does give rise to a suspicion of guilt at least where the inquiry does not involve belief. See Griswold, *The Fifth Amendment Today* (Harvard University Press, Cambridge, 1955), 58-59. It is correct that the bar and the bench should defend the privilege against those "who wrongly conceive of it as merely a shield for the guilty", *Quinn* v. *United States*, 349 U. S. 155, 164 (1955). But to say that it is wrong for elements of the public to assume that every man who relies upon the privilege is guilty and to take steps to correct that impression does not warrant overreacting to the public view by denying that it is suspicious to insist upon immunity from prosecution when asked a question about matters like official corruption.

judiciary a judge who has put a price—the price of personal immunity—upon his testifying concerning corruption in the state government.

C. Contrary to petitioner's assertion (Petition, pp. 18-19), the grant of certiorari in *Murphy v. Waterfront Comm'n of N. Y. Harbor*, *cert. granted*, 375 U. S. 812 (1963),* does not support the grant of certiorari in this case. This case is substantially different from *Murphy*. In the first place, petitioner was a judge whereas the individuals involved in *Murphy* were private citizens, and petitioner was removed from the bench whereas they were held in contempt and ordered to stay in jail until they talked. The difference in the positions of the individuals involved, in their duties and responsibilities, and the difference in the action taken by the two states are enough to make the action taken below reasonable and constitutional even if the action taken in *Murphy* is held to be unreasonable and unconstitutional. Secondly, it seems clear that the contention that petitioner might have given answers that would have exposed him to federal prosecution has been raised as an afterthought for the purpose of aiding in the effort to obtain certiorari. It was not mentioned below.

In addition to his main claim that his removal from the bench for refusing to waive his immunity when asked to testify about official corruption was impermissible under the Constitution of the United States, petitioner claims that he was denied the procedural rights due to him under that Constitution. He was not. The procedure below met the standards of the fourteenth amendment. It was fair.

Petitioner claims (1) that he was not (a) fully apprised of the charges and evidence against him, (b) per-

*For the state court opinion in *Murphy* see *Application of the Waterfront Comm'n of N. Y. Harbor*, 39 N. J. 430, 189 A. 2d 36 (1963).

mitted to confront and cross-examine witnesses, and (c) permitted to offer evidence in explanation, rebuttal or mitigation, and (2) that he was not given either fair warning that his "refusal to testify" would result in removal or a "chance to comply" before removal was adjudged. (Petition, pp. 16-17.)* Those contentions are without merit. None of them, moreover, was raised below.

Petitioner was fully apprised of the charges against him by virtue of the charges which were served upon him.**

*In addition, petitioner contends (Petition, pp. 17-18) that the Court on the Judiciary failed to afford him the equal protection of the laws in that it failed to apply to him two "well recognized" rules of New York State Law. Apart from the fact that without intentional or purposeful discrimination mis-application of state law does not give rise to a federal question, *Snowden* v. *Hughes*, 321 U. S. 1, 7-13 (1944), petitioner has misconceived the law of New York to which he refers. It is not the New York rule that the rights of a possible target of a grand jury investigation are "grossly impaired and violated" if he is called as a witness, sworn and asked questions. (Of course even if it were, the transcript of petitioner's appearance shows that he was neither sworn nor asked questions (App. 45-48) and petitioner's answer admits that he was not subpoenaed.) The rule is, rather, that if such a person is questioned without having signed a waiver of immunity, the grand jury is prohibited from indicting him and the government is prohibited from using against him any incriminating information that he may give. The assertion that petitioner's rights were violated by the act of asking him to testify begs the very question that was at issue before the state court—whether a judge to remain a judge must tell what he knows about official corruption without placing a condition upon his willingness to testify. Similarly, the New York rule referred to by petitioner in the first full paragraph of page 18 of the Petition is inapplicable to this case; it refers to holding an individual in contempt, not to removal from office. Cf. *Matter of Cohen*, 7 N. Y. 2d 488, 166 N. E. 2d 672 (1960); *Matter of Lerner* v. *Casey*, 2 N. Y. 2d 355, 141 N. E. 2d 533 (1957). If there was any question about the rules of state law before the decision below—which there was not—the rules were, moreover, resolved against petitioner by the decision below.

**Petitioner's claim that he was not fully apprised of the charges against him is belied by the fact that he did not move for a "more definite and certain statement or for particularization in any respect", as he was entitled to do under Rule IX of the Rules of the Court on the Judiciary.

(App. 36-40, 41.) Whether or not his refusal to waive his immunity constituted cause for removal raised a pure question of law. By virtue of his answer—which admitted the facts relevant to the waiver question but contended that those admitted facts did not constitute cause for removal—and the stipulation that the transcript of petitioner's appearance before the grand jury was accurate, evidence as to the underlying facts relevant to the charge upon which the court below acted was agreed upon by petitioner and placed upon the record. (App. 42, 43.)

Since the court below was presented with a pure question of law based upon admitted facts there was no reason for witnesses to appear so that they could be confronted and cross-examined. Petitioner, moreover, did not even suggest below that he would want to call, confront, examine or cross-examine a single witness.

Petitioner's claim that he was improperly denied an opportunity for explanation, rebuttal or mitigation, falls along with his claim that he was denied due process in that he was not given either fair warning that his "refusal to testify" would result in removal or a chance to comply before being removed. In the first place, such arguments were not made either in petitioner's counsel's letter to the Governor refusing the Governor's request that petitioner resign or in the court below. Considerations of federalism and the proper workings of a judicial system mean that this Court should not consider constitutional arguments raised for the first time in this Court which could have been raised in the state court below.*

*Had such arguments been raised, moreover, the undersigned would have had cause to introduce contradictory evidence, such as the fact that high state officials removable at will by the Governor had shortly prior to petitioner's appearance before the grand jury lost their jobs because they refused to waive their immunity when asked to testify before the same grand jury about corruption in the State Liquor Authority.

Secondly, petitioner in fact was warned. Apart from the impression left after his interview with Mr. Scotti three weeks prior to his grand jury appearance (App. 62), petitioner certainly was warned after the Governor asked that a Court on the Judiciary be convened and charges for removal were served upon him. Yet he did not then ask to offer any evidence in explanation, mitigation or rebuttal, or claim that he had not been warned, or suggest that if the Court on the Judiciary found that he had a duty to talk freely about official corruption his removal be made conditional upon his failing to offer to waive his immunity within a given period.*

Finally, one sensitive to the special responsibilities of judges and knowledgeable about cases decided by New York's highest court and by this Court—as a judge must be held to have been—cannot be said not to have realized that refusal by a judge to waive his immunity when asked to testify about official corruption would be regarded as improper by his brother judges.

CONCLUSION

The decision below did not violate the Constitution. It follows *a fortiori* from four recent decisions of this Court. But its does not raise the first amendment questions involved in three of those cases or the question of discrimination against a group of private citizens involved in the fourth case.

The decision of New York's Court on the Judiciary rests upon the premises that judges must avoid suspicion and be beyond reproach and must be willing to take personal risks

*Nowhere in his petition or elsewhere, moreover, has petitioner suggested that he would in fact waive his immunity if told that doing so would restore him to the bench.

in order to aid good faith inquiries into official corruption and upon the conclusion that if they refuse to meet the high standards to which the judiciary is held they can be removed from their remote and exalted positions on the bench. Neither the premises nor the conclusion calls for review by this Court.

January 10, 1964.

Respectfully submitted,

BRUCE BROMLEY
Counsel for respondent,
1 Chase Manhattan Plaza,
New York 5, N. Y.

FREDERICK A. O. SCHWARZ, JR.,
Of Counsel.